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No. 82-568

In the Supreme Court of the United States

OCTOBER TERM, 1982

PAUL W. COUSIND, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In this federal income tax case, petitioner seeks review of the decision below that Section 280A of the Internal Revenue Code of 1954 (26 U.S.C.) precluded him from deducting expenses allocable to the portion of his residence used as an office.

The pertinent facts may be summarized as follows: During 1976, petitioner was employed as a junior high school teacher. Under his employment contract, he was required to spend a minimum of seven hours a day at school. He had his own classroom and access to a vacant school office equipped with a telephone (Pet. App. 9-10). During the same period, petitioner also served without compensation as an elected member on the board of trustees of a local community college. The board held regular monthly meetings as well as special meetings on either of two campuses

(Pet. App. 9). Petitioner's position as a trustee at the college was unrelated to his employment as a teacher (Pet. App. 10).

Petitioner lived in a mobile home during the year in issue. Although it was not required by his employment, petitioner used part of his home as an office to prepare lessons, to communicate over the telephone with parents of his students, and to grade papers. He also used his home office for some of his duties as a trustee, such as answering and making telephone calls, reading correspondence, and preparing for board meetings (Pet. App. 10).

On his 1976 federal income tax return, petitioner deducted expenses attributable to the portion of his home that he used as an office. On audit, the Commissioner of Internal Revenue disallowed the deductions on the ground that the expenses did not come within any of the statutory exceptions to Section 280A(a), which generally prohibits deductions for expenses attributable to a taxpayer's use of a portion of his personal residence for business purposes (Pet. App. 11).[1] The Tax Court upheld the Commissioner's

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[1]Section 280A read, in pertinent part, for the taxable year ended December 31, 1976 as follows:

> SEC. 280A. [as amended by Section 601(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1529] DISALLOWANCE OF CERTAIN EXPENSES IN CONNECTION WITH BUSINESS USE OF HOME, RENTAL OF VACATION HOMES, ETC.
>
> (a) *General Rule.* — Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an electing small business corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.
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> (b) *Exception for Interest, Taxes, Casualty Losses, Etc.* — Subsection (a) shall not apply to any deduction allowable to the taxpayer without regard to its connection with his trade or business (or with his income-producing activity).

disallowance of the claimed deductions (Pet. App. 11-16), and the court of appeals affirmed (Pet. App. 16-19).

Petitioner's sole contention (Pet. I) is that the Commissioner disallowed his home office expense deductions pursuant to "a non-existent set of regulations" and that, in so doing, he improperly expended funds "for an activity unfunded by Congress." There is no basis for that contention. Although proposed regulations promulgated under Section 280A (Proposed Treasury Regulations on Income Tax, Section 1.280A-2(b)(2), 45 Fed. Reg. 52399, 52403 (1980)) were subsequently withdrawn by the Treasury after questions concerning their scope had been raised by members of the Congress, the withdrawal of those proposed regulations did not affect the Commissioner's authority to disallow petitioner's claimed deductions. Indeed, the record is clear that in disallowing the deductions in the statutory notice of deficiency (R. 10)[2] and in defending that disallowance in the courts below, the principal authority on which

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(c) *Exceptions for Certain Business or Rental Use; Limitation on Deductions for Such Use.* —

(1) *Certain business use.* —Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis —

(A) as the taxpayer's principal place of business,

(B) as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or

(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

In the case of an employee, the preceding sentence shall apply only if the exclusive use referred to in the preceding sentence is for the convenience of his employer.

[2] "R." refers to petitioner's record appendix in the court of appeals.

the Commissioner relied was Section 280A(a) of the Code itself. The proposed regulations were simply a preliminary administrative interpretation of Section 280A and added nothing to the responsibility Congress already had imposed upon the Commissioner under the statute. Cf. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134-135 (1936). Thus, the cases upon which petitioner relies (Pet. 3-6), which hold that the executive branch may not spend money for activities not funded by Congress, have no bearing on this case.

Moreover, the Treasury withdrew the proposed regulations for reasons altogether unrelated to the grounds upon which petitioner's deductions were disallowed. Petitioner's principal contention in seeking to avoid the general prohibition of Section 280A(a) was that, inasmuch as he used his home office on a regular basis for grading his students' papers, preparing their lessons, and talking to their parents on the telephone, his home office represented a regular place of business and therefore his expenses were deductible under the exception set forth in Section 280A(c)(1)(B).[3] The proposed regulations were withdrawn because of questions raised in the Congress with regard to certain provisions concerning vacation homes and rental of property to relatives arising under subsections 280A(a), (e) and (g). Some members of Congress were also concerned that the proposed regulations contradicted the Tax Court's decision in *Curphey* v. *Commissioner*, 73 T.C. 766 (1980), appeal dismissed, No. 80-7678 (9th Cir. Feb. 22, 1982), that, for purposes of Section 280A(c)(1)(A), a taxpayer engaged in more than one trade or business may have more than one

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[3]The courts below properly rejected that contention because petitioner presented no evidence that he regularly met with clients or customers in his home office in the normal course of his trade or business.

principal place of business.[4] Since this case did not involve vacation homes or rental of property to relatives and since petitioner never claimed that he had more than one trade or business for purposes of Section 280A(c)(1)(A), the Treasury's decision to withdraw the proposed regulations has no relevance to this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[4]The Tax Court's decision in *Curphey* accorded with the interpretation of the statute advanced by some members of the Congress. Section 280A(c)(1)(A) was eventually amended to codify the decision in *Curphey*. See Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, Section 113(c), 95 Stat. 1642.